Office-Supreme Court, U.S.
FILED
NOV 28 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-506

In the Supreme Court of the United States

OCTOBER TERM, 1984

METROPOLITAN HOSPITAL, PETITIONER

v.

PROVIDER REIMBURSEMENT REVIEW BOARD, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
SANDRA WIEN SIMON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

16 pp

QUESTION PRESENTED

Whether the Secretary of Health and Human Services correctly determined that petitioner's "maxicare unit" did not qualify for Medicare cost reimbursement at the rate for a "special care unit" under 42 C.F.R. 405.452(d)(10) (1977).

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutes and regulations involved 2

Statement 2

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Batterton v. *Francis*, 432 U.S. 416 5

Community Hospital of Indianapolis, Inc. v. *Schweiker*, 717 F.2d 372 ..... 6, 7

John Muir Memorial Hospital, Inc. v. *Schweiker*, 664 F.2d 1337 6

Lexington County Hospital v. *Schweiker*, 740 F.2d 287 ..... 6, 7

NKC, Inc. v. *Secretary of Health & Human Services*, No. 83-5864 (6th Cir. Nov. 15, 1984) 6, 7

Psychiatric Institute of Washington, D.C., Inc. v. *Schweiker*, 669 F.2d 812 6

Saint Luke's Hospital of Bethlehem, Pa. v. *Schweiker*, [1981-1982 Transfer Binder] Medicare & Medicaid Guide (CCH) para. 31,501, aff'd mem., 688 F.2d 824 ..... 6, 7

Schweiker v. *Gray Panthers*, 453 U.S. 34 5

Page

Cases—Continued:

Sun Towers, Inc. v. *Schweiker*, 694 F.2d 1036 6

Wisniewski v. *United States*, 353 U.S. 901 6

Statutes and regulations:

Social Security Act, Tit. XVIII, 42 U.S.C. 1395 *et seq.* 2

42 U.S.C. 1395h 2
42 U.S.C. 1395hh 2
42 U.S.C. 1395*oo* 3
42 U.S.C. 1395*oo*(a)(2) 4
42 U.S.C. 1395*oo*(f)(1) 3
42 U.S.C. 1395x(v)(1)(A) 2, 5

Social Security Amendments of 1983, Pub. L. No. 98-21, Tit. VI, 97 Stat. 149 *et seq.* 7

20 C.F.R. 405.430(b)(9) (1973) 3

42 C.F.R. :

Pt. 405, Subpt. D 2

Section 405.406(b) 3
Section 405.452 3
Section 405.452(d) 2
Section 405.452(d)(10) (1977) ... 2, 3, 4, 5, 6, 8
Section 405.453 3
Section 405.1835(a)(3) 4
Section 405.1839 4

Page

Miscellaneous:

37 Fed. Reg. 10354 (1972) 3

42 Fed. Reg. 52826 (1977) 3

49 Fed. Reg. (1984):

p. 234 8

p. 235 8

Medicare Provider Reimbursement Manual, HIM-i5, Pt. I, § 2202.7 (1977) 5

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-506

METROPOLITAN HOSPITAL, PETITIONER

v.

PROVIDER REIMBURSEMENT REVIEW BOARD, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is reported at 735 F.2d 1350 (Table). The opinions of the district court (Pet. App. A3-A8) and of the magistrate (Pet. App. A10-A37) are unreported. The opinion of the Provider Reimbursement Review Board (Pet. App. A38-A47) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A2) was entered on May 31, 1984. A petition for rehearing was denied on July 3, 1984 (Pet. App. A48-A49). The petition for a writ of certiorari was filed on September 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Medicare statute, 42 U.S.C. 1395x(v)(1)(A) and 1395hh, are reproduced at Pet. App. A50-A52. Relevant regulations governing the Medicare program, 42 C.F.R. 405.452(d)(10) (1977) and 42 C.F.R. 405.452(d) are reproduced at Pet. App. A53-A55.

STATEMENT

1. Title XVIII of the Social Security Act, 42 U.S.C. 1395 *et seq.*, establishes the Medicare program. Part A of that program authorizes reimbursement of institutional providers for medical care rendered to the aged and disabled. Providers receive reimbursement for the reasonable and necessary costs of the services they provide to Medicare beneficiaries. Congress has vested the Secretary of Health and Human Services with broad discretion to promulgate regulations governing the determination of "reasonable cost" for purposes of the Medicare program. 42 U.S.C. 1395x(v)(1)(A). Under the Secretary's regulations, 42 C.F.R. Pt. 405, Subpt. D, an average per diem cost is determined for services provided by a hospital. That figure is multiplied by the number of patient days attributable to Medicare beneficiaries. The regulations distinguish between care provided in "routine care units" and that provided in "special care units." 42 C.F.R. 405.452. The average per diem costs for each class are calculated separately; such costs normally are higher in the special care units than in routine care units.[1]

Fiscal intermediaries, which act as the Secretary's agents, perform the initial calculation and review of provider reimbursement requests. 42 U.S.C. 1395h. At the close of the fiscal year, a provider submits its cost report to the fiscal

---

[1]This description of the reimbursement process applies to the period at issue in this case. Since that time, Congress has significantly revised the Medicare reimbursement scheme. See pages 7-8, *infra*.

intermediary for review and audit. 42 C.F.R. 405.406(b), 405.453. A provider that is dissatisfied with the intermediary's determination may appeal to the Provider Reimbursement Review Board (PRRB). 42 U.S.C. 1395*oo*. Providers may seek judicial review of PRRB decisions after the administrative proceedings have been completed. 42 U.S.C. 1395*oo*(f)(1).

2. Petitioner is a 215-bed nonprofit, acute-care general hospital. In 1971, petitioner opened a "maxicare unit" (MCU). The MCU was classified as a special care unit (SCU) for Medicare purposes until early 1979, when petitioner's fiscal intermediary (Blue Cross of Greater Philadelphia) determined that the unit should be reimbursed as a routine care unit, not as an SCU (Pet. App. A38-A39). As a result of the reclassification, petitioner lost Medicare reimbursement in the amounts of $5,331 for 1976, $173,439 for 1977, and $280,141 for 1978 (*id.* at A39).

Petitioner appealed to the PRRB, which affirmed the intermediary's conclusion that the maxicare unit did not meet the requirements for an SCU under 42 C.F.R. 405.452(d)(10) (1977).[2] The PRRB agreed with the

---

[2]42 C.F.R. 405.452(d)(10) (1977) provided:

> *Intensive care units, coronary care units, and other special care inpatient hospital units.* To be considered an intensive care unit, coronary care unit, or other special care inpatient hospital unit, the unit must be in a hospital, must be one in which the care required is extraordinary and on a concentrated and continuous basis and must be physically identifiable as separate from general patient care areas. There shall be specific written policies for each of such designated units which include, but are not limited to burn, coronary care, pulmonary care, trauma, and intensive care units but exclude postoperative recovery rooms, postanesthesia recovery rooms, or maternity labor rooms.

The petition refers to 42 C.F.R. 405.452(d)(10) (1972). See, *e.g.*, Pet. 2, 4. However, the provision at issue was not placed in 42 C.F.R. until

intermediary that petitioner did not have specific written policies applicable to the MCU and that the care provided in the MCU was not extraordinary, concentrated, and continuous, as required for an SCU (Pet. App. A44-A45).[3]

3. Petitioner sought judicial review of the PRRB decision in the United States District Court for the Eastern District of Pennsylvania. The district court affirmed the PRRB decision (Pet. App. A3-A8). The court examined the six criteria for identification of an SCU set out in 42 C.F.R. 405.452(d)(10) (1977). It rejected the PRRB's finding that specific written policies did not exist for the MCU (Pet. App. A5). However, the court concluded that substantial evidence supported the PRRB's additional finding that the MCU did not render service that was extraordinary, concentrated, and continuous, as required by the regulation (*id.* at A5-A6). The court determined that the PRRB acted properly in comparing care in the MCU with care provided in petitioner's Coronary Care Unit (CCU) and Intensive Care Unit (ICU). The court rejected petitioner's claim that the PRRB instead should have compared the MCU with routine care units. *Id.* at A6.[4]

1977. See 42 Fed. Reg. 52826 (1977). When it was promulgated in 1972, the provision was codified at 20 C.F.R. 405.430(b)(9) (1973). See 37 Fed. Reg. 10354 (1972).

[3]The PRRB dismissed for lack of jurisdiction petitioner's appeal of the 1976 cost determination, since the amount at issue was less than $10,000. See Pet. App. A39-A40; 42 U.S.C. 1395*oo*(a)(2); 42 C.F.R. 405.1835(a)(3), 405.1839.

The Deputy Administrator for the Health Care Financing Administration, acting on behalf of the Secretary, declined to reverse, affirm or modify the PRRB's decision; that decision therefore became the final action of the agency. See Pet. App. A19.

[4]A magistrate had concluded previously (Pet. App. A32-A33) that the nursing care provided in petitioner's MCU was extraordinary, continuous, and concentrated. The district court rejected that conclusion. The magistrate and the district court agreed that there was

The court of appeals affirmed without opinion (Pet. App. A1-A2).

ARGUMENT

The decisions of the courts below are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioner challenges the finding of the PRRB, upheld by the courts below, that its MCU did not qualify as a special care unit. Petitioner initially contends that deference is not due to the Secretary's interpretation of 42 C.F.R. 405.452(d)(10) (1977), the Medicare regulation that sets out criteria for identification of SCUs. Congress has delegated to the Secretary the authority to establish standards for the determination of "reasonable cost" for purposes of the Medicare program. 42 U.S.C. 1395x(v)(1)(A). In those circumstances, considerable deference normally is accorded to the Secretary's interpretation of the statute. See *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43-44 (1981); *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977).

Petitioner contends (Pet. 6-13), however, that deference is inappropriate in this case because the Secretary did not rely on 42 C.F.R. 405.452(d)(10) as it was promulgated in 1972 (see note 2, *supra*), but instead applied a new interpretation promulgated in a 1977 revision to the Medicare Provider Reimbursement Manual, HIM-15, Pt. I, § 2202.7. But in fact neither the PRRB nor the courts below relied on the 1977 revision; rather, they applied only the criteria set out in the 1972 regulation itself. The PRRB in its decision stated specifically that it reached its conclusion "on the

---

substantial evidence to support the PRRB's conclusion that petitioner was not entitled to Medicare reimbursement for certain interest expense. See Pet. App. A8, A34-A37. The petition does not raise the latter issue.

basis of Section 42 C.F.R. 405.452(d)(10), and without benefit of clarification rendered by section 2202.7" (Pet. App. A46). And the six criteria the district court applied in this case (*id.* at A4-A5) are the same criteria specified in the 1972 regulation. Thus, the questions petitioner raises concerning deference to, and retroactive application of, the 1977 interpretation are irrelevant to this case.

2. Petitioner also contends (Pet. 13-15) that the decisions below conflict with *Saint Luke's Hospital of Bethlehem, Pa.* v. *Schweiker,* [1981-1982 Transfer Binder] Medicare & Medicaid Guide (CCH) para. 31,501 (E.D. Pa. 1981), aff'd mem., 688 F.2d 824 (3d Cir. 1982) (Table), and *Community Hospital of Indianapolis, Inc.* v. *Schweiker,* 717 F.2d 372 (7th Cir. 1983). Of course, to the extent the decisions below may create a conflict within the Third Circuit, it would not warrant this Court's attention. See *Wisniewski* v. *United States,* 353 U.S. 901 (1957). In any event, the conflict petitioner cites does not exist.

Like the court in this case, the courts in *Saint Luke's Hospital* and *Community Hospital* applied the substantial evidence standard to determine whether the units at issue in those cases were sufficiently comparable to recognized SCUs to satisfy the regulation.[5] In *Saint Luke's Hospital* and *Community Hospital,* the courts concluded that the units at issue there provided extraordinary, concentrated,

---

[5]This approach is similar to that applied by other courts that have considered whether a particular unit qualified as an SCU. See, *e.g., NKC, Inc.* v. *Secretary of Health & Human Services,* No. 83-5864 (6th Cir. Nov. 15, 1984); *Lexington County Hospital* v. *Schweiker,* 740 F.2d 287, 289-290 (4th Cir. 1984); *Sun Towers, Inc.* v. *Schweiker,* 694 F.2d 1036 (5th Cir. 1983); *Psychiatric Institute of Washington, D.C., Inc.* v. *Schweiker,* 669 F.2d 812 (D.C. Cir. 1981); *John Muir Memorial Hospital, Inc.* v. *Schweiker,* 664 F.2d 1337 (9th Cir. 1981). The courts in these cases have concluded that determinations based on comparison of the unit at issue with recognized SCUs are consistent with 42 C.F.R. 405.452(d)(10) (1977).

and continuous care and therefore qualified as SCUs. But those fact-bound determinations do not require the conclusion that a different unit, *i.e.*, petitioner's MCU, also meets the criteria for an SCU.

Contrary to petitioner's suggestion, the legal standards applied in this case and in the cases cited by petitioner do not conflict. The court in *Community Hospital* held that the Secretary's argument in that case that an SCU must treat patients who are critically ill and in immediate life-threatening situations was inconsistent with the regulation in effect during 1977 and 1978. But there is no indication that either the PRRB or the district court applied such a standard in this case. In both *Community Hospital* and *Saint Luke's Hospital,* the courts rejected any claim that an SCU must provide care that is "identical" or "equal" to that provided in coronary or intensive care units. The district court in this case likewise rejected such an "equality" test. See Pet. App. A6 n.2.[6] Indeed, the court noted specifically that the test it applied was not inconsistent with *Saint Luke's Hospital.* See Pet. App. A6 n.2.

In any event, Congress recently amended the Medicare statute by completely revamping the manner of payment for most hospital services to covered individuals. Social Security Amendments of 1983, Pub. L. No. 98-21, Tit. VI, 97 Stat. 149 *et seq.* Under the amended statute, most hospital providers will be reimbursed on the basis of patients' diagnoses; the costs these providers actually incur will be irrelevant in computing reimbursement. The new prospective payment system will be phased in over the three years

---

[6]Some courts have expressly approved application of an "equality" test as a method of identifying SCUs. See *NKC, Inc.* v. *Secretary of Health & Human Services,* slip op. 4; *Lexington County Hospital* v. *Schweiker,* 740 F.2d at 290.

following October 1, 1983. See 49 Fed. Reg. 234, 235 (1984). To the extent that identification of SCUs may continue to be an issue, it will arise in a considerably different statutory and regulatory context. Accordingly, decisions like this one, which concern computation of Medicare reimbursement for past cost years, appear to have only limited significance for the future.

3. Petitioner contends finally (Pet. 15-17) that the PRRB's findings and conclusions are not supported by substantial evidence and that the evidence clearly demonstrates that its MCU is an SCU within the meaning of 42 C.F.R. 405.452(d)(10) (1977). But as the district court noted (Pet. App. A6-A8), there was ample evidence that the level of care provided in the MCU was considerably less extraordinary, concentrated, and continuous than the level of care in petitioner's CCU and ICU facilities. That evidence showed that (1) in 1978 nursing hours per patient day in the MCU were 12.66, compared to 24.01 and 27.97 in the CCU and ICU respectively; (2) 1978 cost per patient day in the MCU was $207, compared to $378 and $406 in CCU and ICU respectively; (3) there was a marked disparity in the electronic monitoring devices available in the MCU and the CCU and ICU; (4) the MCU physically resembled the routine care units, rather than the CCU and ICU; (5) approximately 39% of MCU patients had been transferred from ICU/CCU areas after their conditions had stabilized; (6) unlike ICU/CCU areas, MCU rooms had televisions and telephones available, as well as more liberal visiting privileges; (7) patients' vital signs were taken every four hours in the MCU, while those in the ICU and CCU were taken every two hours. The district court correctly concluded that this evidence was sufficient to establish that petitioner's MCU did not qualify as an SCU.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
SANDRA WIEN SIMON
Attorneys

NOVEMBER 1984

DOJ-1984-11